

COMPLAINT 2008 – NO. 6

In Re Roach

DETERMINATION OF NO REASONABLE CAUSE – ORDER OF DISMISSAL

June, 2009

I. NATURE OF THE COMPLAINT

The complaint alleges that Senator Pam Roach (Respondent) violated the Ethics in Public Service Act (Act) by releasing confidential information (the identity of the Complainant) and that Respondent abused her legislative power through her involvement in a case involving the Complainant as a foster mother.

II. JURISDICTION

The complaint alleges a legislator violated the Act's prohibitions on release of confidential information, use of office to secure special privileges, and use of public resources for private gain. The Board has both personal and subject-matter jurisdiction.

III. PROCEDURAL HISTORY

The complaint was filed in October, 2008, shortly before the regularly scheduled October meeting. The Board was unable to meet until February. The Board ordered an investigation pursuant to **RCW 42.52.420** and Board Rule 1. The Board discussed the progress of the investigation and issues related to the question of reasonable cause during executive sessions of regularly scheduled, monthly meetings through June 18, 2009.

IV. ALLEGATION NO. 1 – DISCLOSURE OF CONFIDENTIAL INFORMATION

Issue: *Is there reasonable cause to believe Respondent violated the Act through disclosure of confidential information about the Complainant?*

Answer: *For the purposes of this Complaint we do not decide whether the identity of the Complainant is "confidential" within the meaning of the Act because we determine there is no reasonable cause to conclude that her identity was improperly disclosed.*

The Act defines confidential information, **RCW 42.52.010(6)** as follows:

"Confidential information" means (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law.

RCW 42.52.050 prohibits the use or disclosure of confidential information in certain circumstances. (1) If a legislator discloses or otherwise makes use of the information obtained by reason of the legislator's official position to obtain some type of personal gain or benefit for self or others unless there is a statute or contract between the legislator and the person who has authority to waive the confidentiality of the information. Clearly, this is directed at "self-dealing" which prohibits legislators who come into possession of confidential information from using this information for their personal benefit or the personal benefit of others. This restriction is not the issue in the present case. (2) .050 also, in subsection 3, provides that no legislator may disclose confidential information to any person not entitled or authorized to receive the information. Complainant alleges that the Respondent wrote about her on a blog, using certain personal identifiers which the Complainant knew applied to her and that constituted an unlawful disclosure.

A. Determination of Facts

There is reasonable cause to believe the following facts are among those which have been established by the investigation on the issue of disclosure.

1. By July of 2008, Respondent was posting information and/or allegations about Complainant on Respondent's personal, non-legislative blog.
2. The blog information and commentary were in relation to Respondent's efforts to assist constituents who were grandparents of a minor child who had been placed in foster care. Complainant was the foster mother of the child. The grandparents feared the child would be lost to them, physically and legally, and were concerned that the Department of Social and Health Services (DSHS) was committed to a course of action which would accomplish that result. That course of action, in the view of the grandparents and the Respondent, included ignoring the laws on preference of placement of children with relatives and the suitability of foster parents.
3. The foster mother/complainant alleges that much of the blog information about her was untrue and "slanderous" and it was perceived by her as a personal attack. Specifically, she feels that because it was obvious to her that she was the person being written about on the blog that Respondent knew who she was and that her identity was therefore disclosed in violation of the Act.
4. Complainant acknowledges in her complaint, and the investigation confirms, that at the time the complaint was filed her name had not been disclosed on Respondent's blog.
5. Respondent attended some of the judicial proceedings concerning the minor child. The proceedings she attended were open to the public and anyone in the courtroom was

apparently free to take notes. Somewhat conversely, if anyone sought a transcript of testimony they had heard they would be advised by court personnel that such a transcript was confidential. Notwithstanding the court personnel's position, one Assistant Attorney General informally opined that the Respondent could in fact have a transcript of certain testimony, concluding it was not part of the protected "record" and the transcript was provided. The complaint thrusts the Board into a sometimes allegedly confidential, but sometimes not, environment.

6. Respondent maintains that she learned the name of the foster mother in court. While it is a possibility the name was mentioned in court the explanation is received with skepticism by most of those who were in attendance. On another occasion the Respondent refers to her knowledge on this point as coming from another person.
7. By June, 2008 the Respondent had established contacts within DSHS relative to the case of the minor child. If not by this time then certainly by July 10, the Respondent knew the identity of the foster mother. At one point, no later than September of 2008, the foster mother's name was included, perhaps inadvertently, in copies of e-mails provided to the Respondent by DSHS personnel.
8. Complainant acknowledges that once her name was known to Respondent the information she complains of could be discovered through the internet. She cites age, marital status, employment, and the existence of a ten year old protection/restraining order she obtained against another as examples of information which flowed from the knowledge of her name. It is this information she claims is misleading if not slanderous or lies.
9. The complaint was received by the Board on October 2, 2008. On October 6, and pursuant to the Act, Respondent was mailed a copy of the complaint and documents submitted in support thereof. As required by the Act the complaint included the name, address and phone number of the Complainant. In addition, a standard cover letter from the Board was sent to Respondent which explained the complaint process and advised that the Act imposed no legal obligation on Complainant or Respondent to keep the complaint information confidential.
10. The Respondent referenced receipt of the complaint on her blog on October 15. Although she still refrained from naming the foster mother and the child she did provide a link to another site which she acknowledged contained that information. This linked site was extremely critical of the foster mother's life, her associations, and her ability to safely care for the child. The web site was savealexisnow.com.

11. Savealexisnow.com was registered by Christopher Clifford on July 14, 2008. According to senate payroll records Clifford was employed as a Legislative Assistant to Respondent from July 1, 2008 through July 18, 2008. Clifford continued as a de facto representative of the Respondent on this case beyond his official term of employment and he is often referred to by Respondent as the personal investigator she had hired.

B. Determination of Violations of Law

Subsection (1) of **RCW 42.52.050** addresses the “outside” business or professional activities of state officers and state employees and warns them about accepting other employment which might be reasonably expected to require or induce use of confidential information acquired by reason of their official (state) positions. This subsection is not at issue in this case.

Subsection (2) prohibits state officers or state employees from disclosing or using confidential information gained through their official positions for personal benefit or gain for themselves or others. The information may be used if authorized by statute or contract. This subsection is directed at personal use for private gain or benefit and is not at issue in this case.

Subsection (3) is a general prohibition on disclosure and reads as follows:

“No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.” This subsection is at issue given the allegation of disclosures on the blog.

The facts of the case suggest that Respondent could have learned the identity of the foster mother from a number of sources including contacts within state government or, perhaps but less likely, from proceedings in the courtroom. However, disclosure of the information is the issue.

No evidence was discovered that Respondent disclosed the name of the foster mother to any one not entitled or authorized to receive it prior to the time this complaint was filed. At the time of filing the complaint and other documents provided in support of the complaint were forwarded to Respondent as required by rule. Also, as required, Complainant signed the complaint and listed her address and phone number. In addition to these materials Respondent received a cover letter explaining the complaint process. This letter also instructed Respondent that the Act imposed no legal obligation to treat these materials as confidential.

The Act does not permit an anonymous legislative ethics complaint or require that the parties to a legislative ethics complaint remain silent about its particulars. Respondent did eventually disclose the identity of the foster mother when she linked her blog to Clifford’s website on October 15.

V. ALLEGATION NO. 2 – USE OF PUBLIC RESOURCES AND OFFICE TO INTERVENE ON BEHALF OF CONSTITUENTS

Issue: *Is there reasonable cause to believe Respondent violated the Act because she used her office and public resources to advocate for these constituents?*

Answer: *No. Subject to certain limitations legislators may advocate for constituents through use of office and public resources.*

A. Determination of Facts

There is reasonable cause to believe the following facts are among those established by the investigation on the issue of whether the Act prohibited Respondent's intervention. The facts determined in Allegation No. 1 are incorporated by reference.

1. Constituents of Respondent requested her help in the case of their granddaughter, a minor child. The child had been removed from the care of the birthmother and placed in foster care. DSHS was, in the view of the grandparents, ignoring a law which expressed a preference for placement of the child with relatives. They also had concerns about the manner in which DSHS was exercising its oversight of the foster environment and the suitability of the foster mother to safely care for the child.
2. Respondent utilized senate committee staff, senate caucus staff, and her legislative assistants over a period of several months in efforts to assist the grandparents. Respondent also utilized numerous other public resources including e-mail, stationery and phones. Respondent was always clear that she was involved as a Senator and was bringing the weight of her office into the dispute.
3. There are a number of laws applicable to judicial proceedings and agency procedures relative to a minor child who has been placed in the care of DSHS. These call for efforts to reunite the child with the birth parents. They also address determination of dependency, termination of parental rights, guardianship and adoption. In addition, **RCW 13.34.130** expresses a preference for placement of the child with relatives if efforts to reunite the child with the birth parents prove unsuccessful. The process can be emotional, complex and somewhat bewildering. The best interest of the child is the paramount concern.

B. Determination of Violations of Law

RCW 42.52.070 (Special privileges) states:

Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for herself, or his her spouse, child, parents, or other persons.

RCW 42.52.160 (Use of persons, money, or property for private gain) states in pertinent part:

- (1) No state officer or state employee may employ or use any person, money or property under the officer's or employee's official control or direction, or in his or her official capacity, for the private benefit or gain of the officer, employee, or another.
- (2) This section does not prohibit the use of public facilities to benefit others as part of a state officer's or state employee's official duties.

Assisting constituents is an example of a legislator's discretionary authority and rendering appropriate assistance falls within a legislator's scope of employment and official duties (**Advisory Opinion 1995 – No. 17** and other cases not cited).

However, a legislator's use of office and public resources to advocate for constituents is not unlimited. The threshold question is whether there is a tangible legislative nexus with the contemplated use of office and public resources.

“When a legislator becomes an advocate for a constituent, public resources and the office of the legislator may be used on behalf of the constituent if a government official or government office is involved or if the constituent is seeking assistance on legislative issues. If either of these two conditions is met, there is a sufficient and tangible legislative nexus to conclude that the advocacy is within the scope of a legislator's employment and/or within his or her official duties” (**Advisory Opinion 2006 – No. 1**).

This opinion notes that advocacy is not appropriate when the goal is to achieve a personal benefit such as fostering a business relationship with the state, for example, and that in such cases legislators need to avoid the perception that “improper means” are used. Some indices of “improper means” may be persistent communications, threats and intimidation.

In the present case Respondent's constituents were engaged in a dispute with a state agency and government officials. The dispute involved the application of a statute enacted by the Legislature which directed that they, as relatives of the minor child, belonged to a class that was to be afforded some degree of preference over third parties in the placement of the child and the contention the agency was not following the statute. In addition, the grandparents represented that other laws and procedures related to the safety of their grandchild in the foster environment and the ability of the foster mother to provide a safe environment were ignored by government officials. The truth of these representations is an issue for the courts and not relevant to the question of legislative nexus.

There was a legislative nexus and the use of legislative office and public resources to advocate for these constituents was appropriate under the Act.

VI. ALLEGATION NO. 3 - "ABUSE OF OFFICE"

"Abuse of office" is not a term found in the Act. Given the context of the pleadings we interpret this choice of words by the Complainant as an allegation that Respondent exceeded permissible bounds of advocacy.

Although Respondent's tactics and methods of advocacy on behalf of her constituents raise many troubling questions and may be perceived by the public and this Board as inconsistent with behavior normally exhibited by legislators, the Act is silent on the issue of how much advocacy is "too much" once a legislator initially engages in permissible advocacy. This is not a case of a legislator using her position to provide "special privileges" (**RCW 42.52.070**) because her advocacy was within her discretionary legislative duties. This is not a case where the Respondent was seeking some personal benefit or exemption through her involvement with DSHS on behalf of her constituents. Rather it is a case where she engaged in, among other things, attacks on the credentials and qualifications of the foster mother and perhaps others involved in the decisions surrounding the future of the minor child.

Determination of Facts

There is reasonable cause to believe the following facts have been established by the investigation or that the investigation has provided information which makes it likely they will be proven at a hearing.

1. Respondent attended four or more court hearings as Senator Roach. She was permitted to speak on at least one occasion and perhaps two.
2. Six e-mails were discovered that were sent by Respondent in July to the judges presiding over the dependency and termination proceedings. These were ex parte contacts. The Court Appointed Special Advocate (CASA), the attorney for the CASA, and others in the courtroom complained to the judge about the ex parte contact, the interference of the Respondent and the misinformation being provided by Respondent.
3. Over a period of many months Respondent criticized DSHS, DSHS employees, the foster mother and the CASA on her blog. No evidence was discovered that public resources were used to establish or maintain the blog but some of the information found there did come from Respondent's use of office and public resources.
4. The CASA Program Manager for King County stated that Respondent phoned her on July 9, and (a) asked her if they receive state funds, (b) demanded they fire the CASA in the case, and (c) threatened to engage in a media campaign.

5. Respondent phoned a DSHS employee who documented the call in an e-mail to a DSHS official. The e-mail states the Respondent requested DSHS to write a letter asking that the CASA be removed and stated "I will be talking to Dino Rossi and Val Stevens about this case and you know they will use it in their elections."
6. Respondent phoned police about the child's day care center and the alleged failure to report the child's black eye. A police officer followed up with the day care. Respondent was denied the opportunity by the court to speak to the black eye issue. DSHS followed up on the allegation and expressed its belief the reporting issue was properly conducted and documented.
7. On September 8, with a copy to Christopher Clifford, Respondent e-mailed DSHS personnel and wrote "I would like Alexis removed from the foster adopt parent and placed with a relative."
8. On September 9, Respondent sent an e-mail to a DSHS official and others requesting answers to a series of questions and stating "If you have nothing to hide then you will answer. If you hide behind privacy then I am sure we can address this publicly, on the Sunshine Committee."
9. In addition to the examples noted above, there are numerous and frequent examples of communications between the Respondent and various state officers and employees. On some occasions the Respondent repeated demands for certain action and most always there was a list of questions she wanted answered. Respondent generally linked these demands and inquiries to the issue of the rights of relatives in juvenile proceedings.
10. Respondent hired Christopher Clifford as her Legislative Assistant (LA) for three weeks in July, 2008. No evidence of the LA working on any issue other than the one on behalf of the grandparents was discovered. The LA was assigned a SCAN authorization number and the senate records do not show any use until his last day of official employment. There is no record that he used the e-mail account set up for assistants in Respondent's legislative office. With the exception of on-campus meetings held in connection with this one case there was no record the LA had a presence on campus. Respondent did not have a legislative office in her district.
11. Clifford continued to work on the grandparent's constituent case for several months after he left the senate payroll. Respondent referred to and represented him as "my private investigator" or "the private investigator I hired." He attended meetings with

state officials as a representative of the Respondent after he was off the senate payroll. He exchanged case information with Respondent and Respondent's new LA, as well as others, after he was no longer a state employee. On August 23, Respondent sent an e-mail to her new LA in which she said "Chris and I will feed things to you to have copied and then put into folders."

12. At one point Clifford was directed by Respondent to conduct surveillance at the day care in an apparent effort to see if a scheduled visit between grandparents and the child was going to take place as planned or promised. There are e-mails from Respondent to DSHS complaining that an agent of the agency who was supposed to be present during the visit was late and this cost the grandparents time with the child.
13. In September, 2008 and while still working as the "private investigator" hired by Respondent, Clifford attempted to file a declaration with the court and the court declined to accept it. In his declaration he attacks the "propriety" of the foster mother and advocates for change. His declaration repeats the same allegations about the foster mother found on Respondent's blog.
14. After the complaint was received by the Respondent in early October she provided a link from her blog (on October 15) to the website registered by Clifford. This website revealed the name of the foster mother and repeated many of the allegations against her. It also revealed the child's first name. Respondent warned her readers that the link would provide names. This linked website urges readers not to go the foster mother's home but then provides her address. The website also asks that readers not look up the foster mother's phone number and "start calling her at home."
15. Complainant believes she can identify Clifford as one of two men who came to her home after the complaint was filed and before October 23 (when she referenced this visit in a letter). Complainant stated she received a call on her cell phone inquiring about a car for sale. She had no car for sale and believes the call was a pretext.
16. Complainant states the personal attacks on Respondent's blog and Clifford's website increased after she filed the ethics complaint.
17. There is no evidence to determine whether or not Clifford created his website using state resources.
18. In November, DSHS learned from Complainant that two men "have been spying on her" and the agency provided for surveillance cameras at her residence.

Determinations of Law

RCW 42.52.070 prohibits the use of “improper means,” which is suggested by examples of threats and intimidation on the part of a legislator toward others, when the object is to achieve special privileges or exemptions for self and others. **RCW 42.52.160** prohibits a legislator from utilizing public resources for private benefit or gain. Both statutes contain exceptions when a legislator is acting within the scope of his or her employment and/or benefitting others as part of his or her official duties. Assisting constituents through advocacy, under circumstances identified earlier in this opinion and in precedents of the Board, is within the scope of employment and official duties of a legislator.

VII. SUMMARY

Advocacy on the part of the Respondent carried over to the courtroom. To the extent Respondent utilized her office or public resources to intervene with the court this presented a very unusual and uncommon involvement by a legislator in a judicial proceeding. There is no provision in the Act which directs that otherwise permissible legislative advocacy on behalf of constituents must cease at the courthouse steps. The Separation of Powers Doctrine, which addresses the relationship between the Judicial, Legislative and Executive branches of government, is based upon constitutional principles and the Act does not confer jurisdiction on the Board to rule on constitutional issues. A judge presiding over a case in which a legislator seeks standing or input in the proceedings is the appropriate arbiter of whether that legislator will be heard and if so under what conditions. If the Legislature should choose to address the question of legislator’s use of office and public resources to unilaterally involve themselves in judicial proceedings that would of course be its prerogative.

The Respondent’s demands for information and action from DSHS were driven by her perception and the perception of her constituents that the agency was not following the law relative to the rights of the constituents. Those perceptions were not unreasonable. Under these facts, Respondent’s demands and tone and tenor, while perhaps not those most commonly exhibited by other legislators, were not prohibited by the Act.

Respondent’s use of her Legislative Assistant raises questions about the role of staff. A legislative staff person is a public resource within the meaning of the Act and the facts suggest that this resource was used, perhaps exclusively, to play the role of a private investigator and to carry out that role in ways most foreign to common expectations regarding the role of legislative assistants. The investigation leads to the following conclusions: the LA conducted surveillance of a daycare center; visited the home of the foster mother under less than forthright pretenses; established a website directed at the foster mother during the time he was working for the Respondent as a legislative employee and eventually posted information on that site which he obtained while an employee or otherwise as the agent of the Respondent;

was referred to and portrayed as an emissary of the Respondent long after his official term of employment; and attempted to intervene with the court on behalf of Respondent's efforts in that forum. It is clear that his actions in whole or in part were performed at the direction of or with the tacit approval of the Respondent. While assisting Senators with constituent work is a duty of employment as defined in the Senate's job description for LA's, we seriously question the path taken by this assistant at the direction of the Respondent and would hope that the Senate would review that job description to determine if it is being implemented in the expected fashion.

The foster mother is hurt and angered by what she perceives as personal attacks directed toward her by a state legislator. These feelings are not unreasonable but even though the foster mother/complainant recognized herself as the person being discussed in the Respondent's blog there are no facts which show her identity was thus revealed to anyone who did not already know who she was. That did not occur until after she filed this complaint. She considers much of what was posted there as lies and "slander." If that is the case, that is if the foster mother seeks to prove some interference with her employment relationship with DSHS, or libel through the remarks posted by the Respondent on her personal blog site and/or the site she linked to following the filing of the complaint, the appropriate forum would be a courtroom.

VIII. CONCLUSION AND ORDER

1. Respondent did not disclose the identity of the foster mother to any person not entitled or authorized to receive that information. Respondent's disclosure of the complainant's identity followed the filing of this complaint. The Act does not require that information contained in a legislative ethics complaint be kept confidential by the parties.
2. The statutory framework governing the difficult decisions to be made by those involved in the future of minor children include the courts, state agencies, CASA's, attorneys, foster parents, birthparents and other relatives. These statutes do not include or recognize the role of Respondent acting unilaterally on behalf of relatives.
3. However, even though the Act does not recognize or establish that it is appropriate for a legislator to use his or her position or public resources to advocate under some general oversight- of -laws theory, advocacy through use of position and public resources is permitted when a sufficient legislative nexus is established. The grandparent's allegation that a state agency was ignoring specific and preferential rights granted them by the Legislature, and the grandparent's request for assistance, established the requisite nexus.
4. If this were simply a case in which Respondent used her office and public resources to monitor, judge and attempt to drive the foster mother into some other line of work

then the facts support a finding of reasonable cause. There would be no legislative nexus because the responsibility for licensing and oversight of foster parents is a function of the executive branch. However, the foster mother and perhaps others were part of a bigger issue and that was the question of whether the grandparents' rights in the process were being ignored or violated by government officials.

5. Respondent's theory was that the system was working in reverse of what the Legislature intended when it passed the law on the rights of relatives in these types of cases. In so doing, goes the theory, the rights of the relatives to be considered as a preferred placement alternative were being ignored in favor of non-relatives. One way to advocate for the relatives was to attempt to show, on their behalf, that the foster mother would not provide a safe environment for the child. Respondent and grandparents were frustrated because they read the law as saying that the system should, if it determines the child should be taken from the birth parent, turn "first" to relatives before seeking foster care placement or adoption.
6. It is the role of the courts, ultimately, and not the Ethics Board to determine who has the better of this argument and what decision is in the best interests of the child.
7. Respondent and her former LA resorted to questionable tactics in dealing with the foster mother. The LA's website and its contents appear to be his private activity. The foster mother's contact information provided on that site could have resulted in a dangerous situation for the foster mother and the child. Providing her physical address and location was reckless and unrelated to the permissible advocacy on behalf of the grandparents. Respondent's linkage to this site from her private blog also appears reckless and contributed to the potential for threats to the safety of the foster mother and the child. If there were sufficient evidence to support a finding that public resources were used in this disclosure we would determine that reasonable cause existed to believe that such use violated the Act's prohibition against personal use of public resources.

This opinion is based upon a very fact-specific situation involving assistance rendered to relatives of a minor child who alleged they were being denied priority rights afforded them by law and who requested Respondent's assistance on that point. Based upon the facts as we understand them to be, there is no reasonable cause to believe Respondent violated the Act, as it is currently written, through the use of her official position and the use of public resources.

IT IS HEREBY ORDERED that the Complaint is dismissed.

David R. Draper, Chair

Date: 6/22/2009